STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWIN D. JOHNSON,

Defendant-Appellant.

UNPUBLISHED
October 15, 2002

No. 234307
Wayne Circuit Court
LC No. 00-009296

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of two counts of assault with a dangerous weapon, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to one to four years' imprisonment for the felonious assault convictions, and to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

On June 27, 2000, Brandon Pritchard was inside his home when he received a phone call from an unidentified male. The caller asked Pritchard to come outside. Pritchard went outside and approached a vehicle. Defendant was in the driver's seat, and his then girlfriend, Terilyn Burton, was in the passenger seat. Defendant asked Pritchard why he (Pritchard) was having sex with defendant's girlfriend. Pritchard began to walk away from the car and was about ten to fifteen feet away from the car when he was struck on the back of the head. After being struck, Pritchard turned to see defendant running toward the car with a club (a mechanical locking device for automobiles) in his hand. Pritchard was taken to the hospital to be treated. He later filed a police report at the hospital.

Two days later, Pritchard was driving in his car with two friends. Pritchard pulled up to a light and noticed defendant in his car behind Pritchard honking his horn. Burton again was in the passenger seat of defendant's car. Pritchard continued to drive and attempted to get defendant's license plate by making a left hand turn. Defendant passed Pritchard's car and then made a u-turn to get behind Pritchard's car again. Pritchard made another left and continued to drive. Pritchard then saw, in the rear view mirror, defendant step out of his car and fire two shots with a handgun at Pritchard's vehicle from a half a block away.

Defendant testified that he did not chase Pritchard, but rather, Pritchard was following him. He also testified that he did not step out of his car or fire a gun.

On appeal, defendant provides an affidavit from Burton. The affidavit states that, "on or about June 15, 2001, Mr. Brandon Pritchard told me 'I know that Double D did not have a gun. I lied to have him put away so he would not be with you. At least you are not seeing him now.'" The affidavit then states that defendant did not have a gun or shoot at anyone on June 29, 2000. Also, the affidavit mentions that Burton was at the trial but was told to leave by defense counsel because she was not properly sequestered.

Defendant's sole claim on appeal is that Pritchard's alleged statement to Burton is newly discovered evidence of perjury that entitles him to a new trial. We disagree.

A motion for a new trial based on newly discovered evidence must first be brought in the trial court. *People v Darden*, 230 Mich App 597, 605-606; 585 NW2d 27 (1998). In this case, defendant failed to move below for a new trial on this ground. Accordingly, this issue is not preserved for review. In order to avoid forfeiture of this unpreserved issue on appeal, defendant must show that (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Once these three requirements have been satisfied, this Court must then "exercise its discretion in deciding whether to reverse." *Id.* Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Id.*

Although this issue is not properly preserved for review, *Carines, supra* at 763, discovery that trial testimony was perjured may be grounds for a new trial based on newly discovered evidence, provided it is otherwise newly discovered evidence. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). Newly discovered evidence is (1) newly discovered; (2) not merely cumulative; (3) probably would have caused a different result; and (4) was not discoverable and producible at trial with reasonable diligence. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998); *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995).

According to Burton, Pritchard admitted lying at trial to keep defendant away from Burton. Even if Burton were to testify consistent with her affidavit, this evidence would be cumulative to defendant's testimony that he believed Pritchard's reasons for filing charges were motivated by his relationship with Burton. Burton's affidavit simply parrots this testimony and provides nothing new to the case, and therefore, would not make a different result probable on retrial. It is especially unlikely considering Burton, defendant's girlfriend or former girlfriend, would be testifying to exculpate defendant. In addition, newly discovered evidence is not ground for a new trial where it would merely be used primarily for impeachment purposes. *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993). Burton's testimony regarding Pritchard's alleged statement would merely serve to impeach Pritchard's testimony.

All other statements in Burton's affidavit are cumulative to evidence presented at trial, as they relate to the events of June 29, 2000, and simply reiterate that defendant did not have a gun or shoot at anyone. This information was known by defendant at the time of trial, and therefore, is not newly discovered. *People v DeMars*, 238 Mich 259, 260; 213 NW 151 (1927); *People v Amos*, 10 Mich App 533; 159 NW2d 855 (1968).

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter